IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.....

SOUTHERN MINERALS CORPORATION, *Petitioner*,

v.

JAY SIMMONS, ET AL., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

I.

Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 455), is reported in 111 F. (2d) 333. The judge before whom this cause was tried in the United States District Court for the Southern District of Texas, wrote no formal opinion but filed findings of fact and conclusions of law (R. 33-46).

II.

Jurisdiction

A statement of the grounds on which the jurisdiction of this Honorable Court is invoked is set forth in the preceding Petition under heading II (pp. 8-9) and are hereby adopted and made a part of this brief.

III.

Statement of the Case

A statement of the case has been made in the preceding Petition under heading I (pp. 2-8) and is hereby adopted and made a part of this brief.

IV.

Specifications of Error

1. The Court of Appeals erred, particularly upon Petitioner's timely request therefor in its Petition for rehearing, in failing specifically and expressly (a) to find, *as a fact* essential to a full and correct determination of the case and the property rights of the parties in issue (instead of *assuming* as a fact for the purpose of disposing of the questions of law expressly considered by it) that the well in question is a gas well as described in the assignment from Houston Oil Company to Southern Alkali, or (b) to set out its conclusions with respect to the rights and titles of Petitioner and Respondents in gas from such well in the event it assumed or found, as did the District Court, that the well in question was an oil well as defined in such assignment.

2. The Court of Appeals erred in holding, inferentially, that if the well in question be an oil well, Respondents

Simmons and Webb are vested with title to gas produced from such well.

3. The Court of Appeals erred in holding that Petitioner was precluded from contending that Respondents had not complied with conditions of the contract provisions in the assignment from Houston to Southern Alkali under which the title to products of five gas wells might be forfeited to Houston, simply because Petitioner had alleged that the well was drilled by Respondents "in an unsuccessful effort to produce oil."

4. The Court of Appeals erred in holding that Respondents Simmons and Webb, by "drilling" the well in question "beyond the gas strata," in which it was completed, "in a search of oil still lower," complied with the condition of the contract provisions of the assignment from Houston to Southern Alkali giving Houston the right to complete a gas well and take the products thereof upon failure of Southern Alkali, or its assigns, to take the well over.

5. The Court of Appeals erred in holding that the contract rights of Houston Oil Company under the assignment from it to Southern Alkali Corporation, dated April 5, 1932, with respect to five gas wells were assignable by Houston Oil Company.

6. The majority of the Court of Appeals erred in holding that the contract rights of Houston Oil Company under the assignment from it to Southern Alkali Corporation, dated April 5, 1932, with respect to five gas wells were intended to be, and were, assigned by Houston Oil Company to Respondents Simmons and Webb by the assignment dated January 6, 1938.

7. The Court of Appeals erred in holding that the rights of Petitioner under the contract provisions of the assignment

by Houston to Southern Alkali defining Petitioner's right to take over a gas well drilled by Houston to be governed by rules relating to simple options of which time is the essence, placing upon Petitioner the burden of showing that it had exercised the option within the time provided rather than in accordance with the rules relating to forfeitures under which the burden is placed upon Respondents of showing strict compliance with all prerequisites to accomplish such forfeiture.

V.

ARGUMENT

Summary of Argument

POINT 1. Since Petitioner's right to the gas from the well, whether it be an oil well or a gas well, was in issue and before the court, it was the duty of the Court of Appeals, particularly upon timely request of Petitioner in its Petition for Rehearing, to find as a fact whether the well is an oil well or a gas well and declare the rights of the parties upon the basis of such finding. Or, if the court proposed to dispose of the case on the basis of assumptions of fact, as distinguished from findings of fact, then the court should have declared the rights of the parties not only upon the hypothesis that the well is a gas well but also upon the hypothesis that the well is an oil well. Anything less, as for example the court's attempt to decide the case upon the one hypothesis that it is a gas well, results in failure fully to adjudicate the rights of the parties and leaves such rights in confusion and doubt and deprives the parties of specific findings and conclusions to which they may assign error upon appeal to this Court for review.

POINT 2. Petitioner owns the leasehold gas rights; Respondents own only the leasehold oil rights. Respondents, as

owners of the leasehold oil rights only, do not *own* gas produced from a well completed by them producing both oil and gas, but have, at most, only a usufructuary right in the gas from such a well, that is the right to make reasonable use of such gas as a lift of the oil therefrom. In appropriating and selling the gas off the premises Respondents are far exceeding their rights of reasonable user.

POINT 3. Respondent Webb testified that the discovery of gas in the well in question was not the result of "an unsuccessful effort to complete a commercial oil well" but that a good producing oil well could have been completed in any one of three or four shallower sands. In view of this testimony and the express provisions of Rules 15(b) and 54(c) of the FEDERAL RULES OF CIVIL PROCEDURE, under which this case was filed and tried, Petitioner was not precluded, by its pleading, from contending that in respect to the well in question Respondents had not complied with the contractual provisions of the assignment from Houston to Southern Alkali giving Houston the right to complete a gas well and own the products therefrom in the event Southern Alkali failed to take the same over.

POINT 4. Respondents did not, simply by drilling in search of oil to lower depths than that in which the well in question was completed, comply with the conditions of the contract provision of the assignment from Houston to Southern Alkali giving Houston the right to complete such well as a gas well and take the products therefrom in the event Southern Alkali, or its assigns, failed to take the well over. Such contract provisions do not give Houston the alternate right to complete any well drilled by it as either a gas well or an oil well but gives it the right to complete a well drilled by it as a gas well only in the event such well cannot be completed as a commercial oil well.

POINT 5. The rights of Houston with respect to gas wells which it might complete (up to five in number), under the contract provisions of its assignment to Southern Alkali, were not assignable by Houston to Respondents Simmons and Webb.

POINT 6. The assignment from Houston to Respondents Simmons and Webb, dated July 6, 1938, did not assign or convey the rights of Houston under the contract provisions of its assignment to Southern Alkali with respect to gas wells (up to five in number) drilled and completed by Houston.

POINT 7. The contract provisions as to taking over gas wells by Petitioner provide a forfeiture and the rights of the parties should have been determined in the light of the rules governing forfeiture rather than the rules governing simple options.

POINT 1

Court of Appeals' Decision Based Upon Assumption Rather Than Finding of Fact Made by District Court

As Petitioner has pointed out in its Petition for Writ of Certiorari (Reason 1, p. 11), it was the duty of the Court of Appeals to *find as a fact* that the well in question is an oil well *or* a gas well; or, if it intended to dispose of the case upon questions of law, to announce its legal conclusions as to Petitioner's rights in gas therefrom not only upon the hypothesis that it is a gas well but also upon the opposite hypothesis that it is an oil well. The Court of Appeals announced its conclusions upon the single *assumption* that the well is a gas well. It did not consider Petitioner's rights in gas from such well upon the opposite hypothesis that the well is an oil well nor express its reasons for not considering such rights; or, if it did consider such rights it failed to set out its con-

clusions with respect thereto. The Court of Appeals' failure in this regard could have been justified only upon the ground that such rights were not in issue or before the court.

By its complaint, upon which the case was tried, Petitioner, without alleging whether the well is a gas well or an oil well, but alleging its ownership of the gas in place, sought to enjoin the appropriation and sale of gas therefrom by Respondents as a continuing trespass upon its real property right and estate therein and to recover damages for gas and liquid products of gas theretofore taken and converted by Respondents (R. 15-21); it sought such relief whether the well be an oil well or a gas well.

To this Respondents answered (R. 23), (1) that the well is an oil well and that Respondents own and accordingly have the right to appropriate and sell gas produced therefrom with oil; (2) but in the alternative, if the well is a gas well, Respondents are entitled to all the products thereof (R. 24, 25).

The rights of Petitioner in gas from the well in question, if it be an oil well, were therefore clearly in issue. That such rights were properly before and considered by the District Court is shown by the announced legal conclusions of that court with respect to Petitioner's right to the relief it sought not only (1) upon the *assumption* that the well is a gas well, but (2) also upon the *finding* of fact that it is an oil well. No claim has ever been made by Respondents that if Petitioner were entitled, upon the facts proven, to injunction and damages, it should be denied such relief because of any deficiency in the pleading. This being true, Petitioner was entitled to such judgment as the proof warranted, regardless of the state of the pleading. Rules 15(b) and 54(c), FEDERAL RULES OF CIVIL PROCEDURE.

Such rights were likewise properly before and presented to the Court of Appeals by appropriate specification and proposition (Petitioner's Brief, Court of Appeals, pp. 150, et seq.), to which Respondents replied by counter-propositions

(Respondents' Brief, Court of Appeals, pp. 148-204), without the remotest suggestion that Petitioner was changing the theory from that upon which it has proceeded in the court below or that its rights to gas from the well in question if it be an oil well were not in issue or properly before the Court of Appeals.

In this state of the case, it was clearly the duty of the Court of Appeals to consider Petitioner's rights with reference to gas from the well in question, though it be an oil well and to set out its conclusions with respect thereto, or expressly to state why it had not considered such rights. Only by so discharging its duty could the Court of Appeals avoid the uncertainties resulting from the judgment rendered by it or protect Petitioner in its right of full review before this Honorable Court of the holdings of the Court of Appeals upon vital and material questions in issue and properly presented to that court for its consideration. RAILROAD COMMISSION v. MAXCY, 281 U.S. 82, 83; PANAMA MAIL SS. Co. v. VARGAS, 281 U.S. 670, 671; PUBLIC SERVICE COMMISSION v. WISCONSIN TELEGRAPH Co., 289 U.S. 67, 69, 70; UNITED STATES v. MAGNOLIA PET. Co., 276 U.S. 160, 165; OKLAHOMA REF. Co. v. SEVENRNS PAVING Co., 251 U.S. 104, 107; MARYLAND CASUALTY Co. v. JONES, 279 U.S. 792; LITTLE MIAMI COL. & S. R. Co. v. UNITED STATES, 108 U.S. 277; LUTCHER & MOORE LBR. Co. v. KNIGHT, 217 U.S. 257.

POINT 2

Even If Well Is an Oil Well, Respondents Do Not Have Title to Gas Therefrom But Only Usufructuary Right in Such Gas

The District Court found as a fact that the well in question is an oil well (R. 41, 42, 45 and 46). Upon such finding

the court held that Respondents were *owners* of gas produced from such well with oil, basing such holding upon the following conclusions:

> (1) That Houston in its assignment to Southern Alkali "reserved" the gas rights "appurtenant" to the right to drill and produce oil and the gas coming from said oil well is appurtenant and necessary to the production of oil (FF(11), R. 43) and consequently the gas produced and sold by Respondents was "*appurtenant* to the oil rights" and a part of the gas rights *retained* by Houston and assigned to Respondents; that accordingly Respondents *owned* the gas from such well (Concl. V, R. 45), and
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> (2) That in its assignment to Southern Alkali, Houston "*reserved* the gas rights appurtenant to the right to drill and produce oil and *reserved* the gas rights appurtenant to the ownership of the oil rights as expressly provided for in the original lease from Harrell and wife to Kelly, which provides:
>
> > " 'Lessee shall have free use of oil, gas, wood and water from said land except water from Lessor's wells for all operations *hereunder*, and the royalty on oil and gas shall be in the net quantity after deducting any so used for operation' (Ex. 'A,' R. 388);"
>
> and that such appurtenant rights were assigned by Houston to Respondents Simmons and Webb and that they *owned* the gas produced from such well (Concl. VI, R. 45, 46).

A simple question should be sufficient to demonstrate that the trial court was in error and that Respondents do not own gas produced with the oil from an oil well. The question is: If Petitioner, as owner of the gas rights, should drill a well cap-

able of producing large quantities of gas and relatively small quantities of oil, would Petitioner thereby, under the terms of its assignment, acquire title to the oil produced with the gas as against Respondents, the owners of the oil rights? Obviously, the answer is no. Petitioner owns the gas rights by assignment under the original lease; Respondents own the oil rights by assignment under the original lease. Respondents do not hold any title in Petitioner's property, as Petitioner does not own any title in Respondents' property. The oil belongs to Respondents, whoever may produce it; the gas belongs to Petitioner, whoever may produce it.

By the oil and gas lease from Harrell and wife to Kelly, the latter, as lessee, under the law as established in Texas, became vested with title to oil and gas in place, as real estate, in the Harrell land. (SIGLER OIL CO. v. W. T. WAGGONER EST., 118 Tex. 509, 19 S.W. (2d) 27; STEPHENS COUNTY v. MID-KANSAS OIL & GAS CO., 113 Tex. 160, 254 S.W. 290; SHEFFIELD v. HOGG, 124 Tex. 290, 77 S.W. (2d) 1021.) No change in such vested title results from the act of producing or because of change of form from gas to liquid as a result of production (LONE STAR GAS CO. v. STINE (Tex. Com. App.), 41 S.W. (2d) 48; HUMBLE OIL & REF. CO. v. POE (Tex. Com. App.), 29 S.W. (2d) 1019-1020; REYNOLDS v. MCMANN OIL & GAS CO. (Tex. Com. App.), 11 S.W. (2d) 778; AMERICAN REF. CO. v. TIDAL WESTERN OIL CORP. (Tex. Civ. App., w. e. ref.), 264 S.W. 335). Such estate as to gas was assigned and conveyed by Houston to Southern Alkali and by Southern Alkali to Petitioner and Petitioner thereby was vested with title to gas in place in the land.

From neither of such assignments was any portion of the gas in and under the land and that might be produced therefrom excepted or reserved, except perhaps gas from five gas wells which Houston might complete under the terms of the contract provisions of the assignment from it to Southern Al-

kali and which Southern Alkali, or its assigns, failed to take over. Such exception or reservation, if such it be, cannot be extended by implication to gas from oil wells which Southern Alkali and its assigns had no right to take over; nor implied to defeat in whole or in part the express grant of gas to Petitioner. (KOENIGHEIM v. MILES, 67 Tex. 213, 2 S.W. 81; SETTEGAST v. FOLEY BROS., 114 Tex. 452, 270 S.W. 1014; JONES v. SUN OIL CO. (Tex. Civ. App.), 110 S.W. (2d) 80, w. e. ref.) It follows, therefore, that if the well is an oil well as defined in the contractual provisions of the assignment from Houston to Southern Alkali, Petitioner being vested with title to gas in place and when produced at the surface from such well, Respondents do not own or have title to gas produced therefrom with oil, and a decision of the case is not dependent upon a construction of instruments but upon established local law.

Since no right, title or interest in the gas was by express or implied reservation, exception or limitation retained by Houston nor assigned by it to Respondents, any right Respondents may have in the gas arises of necessity by implication as an appurtenant to their leasehold estate in the oil. Since gas associated or blended with oil in production of an oil well is a propelling agency of the oil, Respondents have by implication, and as an appurtenant to their estate in the oil, the right (in the nature of an easement) of *user* of such gas as a lift of the oil just as they have the implied and appurtenant right of user of the surface, water an soil. However, Respondents clearly are not, by virtue of such right of user, vested with title to gas produced from a well also producing oil, no more than they are vested with title to the surface and soil simply because of their implied right of user thereof as an incident or appurtenant to their enjoyment of their oil estate.

This was the holding of the Texas Commission of Appeals,

with the approval of the Texas Supreme Court, in the case of GUFFEY v. STROUD, 16 S.W. (2d) 527, 64 A.L.R. 730. In that case the court had before it the respective rights of the owners of an oil lease and the owner of a gas lease on the same tract of land. There the leasehold estates in the gas and in the oil were established by two separate leases. The Harrell lease under which the rights of both Petitioner and Respondents are derived was assignable in whole or in part, and the estate of Petitioner in the gas and of Respondents in the oil was accomplished by assignment of leasehold gas rights to the one and leasehold oil rights to the other, in consequence of which, just as in the case of GUFFEY v. STROUD, Petitioner owned the leasehold estate in the gas and gas rights in the land and Respondents the leasehold estate in the oil and oil rights in the land, each holding as appurtenances to their respective estates such rights of user as were reasonably necessary for them respectively to enjoy the estates owned by them.

In that case the court defined the rights of the owner of the leasehold oil rights in the gas as follows:

> "The right to take oil carried with it *by implication* the right to tap gas pockets and *to bring to the surface* so much of the gas as was necessary in the *proper drilling for oil*. The grant of the oil carried with it *a grant of the way, surface, soil, gas and the like essential to the enjoyment of the actual grant of the oil*. It cannot be said that all use of or interference with the gas in place was wrongful as against defendant in error.
>
> "But the well having been a failure as an oil well, plaintiffs in error have no right to use it as a means or permit it as an occasion for the taking of defendant in error's gas." (Emphasis ours.)

That the court in GUFFEY v. STROUD did not intend to and did not hold that the grant of the oil carried with it ownership of gas produced with oil but only the right of user thereof,

is clearly shown by its holding (1) that the right to take the oil carried with it, *"by implication,"* the right to tap gas pockets and to *"bring to the surface"* only "so much of the gas as was necessary in the *proper* drilling for oil" and (2) by its defining the oil owner's right in the "gas" to be of the same character as its right of "way, surface, soil and water * * * and other *like essential to the enjoyment of the actual grant of the oil.*" In other words the court's opinion is subject only to the interpretation that the owner of the oil had a right in the nature of an easement in such amount of gas as was essential to the enjoyment of the oil estate, i. e., as "was necessary in the *proper* drilling for" and, by implication, producing of oil. The case has been so interpreted by SUMMERS, "Oil & Gas," Perm. Ed., Sec. 652, in which the author states:

> "And if the lease grants only the oil, the lessee *may not market* gas which he discovers, although he has an implied right *to use* such gas for drilling purposes despite the fact that another has a gas lease covering the same land * * * " (Emphasis ours.)

The right of user of gas as a lift must upon elemental principle be reasonably and properly exercised just as the right of user of surface, water and other appurtenant rights must be so exercised with due regard for the title and estate of the Petitioner in such gas (SUMMERS, "Oil & Gas," Perm. Ed., Vol. 4, p. 2, Sec. 652; COZART v. CRENSHAW (Tex. Civ. App.), 299 S.W. 499; SHELL PET. CORP'N v. LIBERTY GRAVEL & SAND CO. (Tex. Civ. App.), 128 S.W. (2d) 471.

That the oil owner's right of user of gas is not an unqualified one is clearly held in GUFFEY v. STROUD, when due consideration is given to the following language of the court:

> "The right to take oil carried with it *by implication* the right to tap gas pockets and *bring to the surface* so much of the gas as was necessary in the *proper drilling for,*" and by implication, production of oil.

And further:

> "But the well *having been a failure as an oil well, plaintiff in error has no right to use it as a means or permit it as an occasion for taking defendant in error's gas.*" (Emphasis ours.)

The court does not further define the word "proper." It may be said with confidence, however, that a "proper" amount of gas could not exceed that which might be *legally* used as a *lift* in the production of oil.

The classification of the well as a gas well by the Railroad Commission of Texas established as a matter of law that the gas from such well could not be used as a *lift* of the oil. Instead, the well being so classified could be operated only for the production of gas which was required to be utilized for light, fuel or other permitted purposes to which gas from gas wells might be put (TEX. REV. CIV. STATS. Art. 6008, Secs. 3 and 7, Appendix A and Art. 6014, Appendix B; CLYMORE PRO. CO. v. THOMPSON, 11 Fed. Sup. 791, 13 Fed. Supp. 469; F. C. HENDERSON, INC., v. RAILROAD COMMISSION OF TEXAS, 56 F. (2d) 218). The liquid obtained from the well was but incidental to the production of gas. Accordingly, Respondents in operating the well in question as a gas well were taking therefrom more gas than might be *legally* taken and, hence, *reasonably* used, as against the right of Petitioner, as a *lift* of the liquid products of the well.

Nor can Respondents operate the well as a gas well and appropriate, sell and dispose of the gas upon the ground that since they cannot operate their well as an oil well (because of its high gas-liquid ratio) it is "necessary" for them to operate it as a gas well and sell and dispose of the gas in order to obtain their oil. It would indeed be the assertion of a strange doctrine that one owner has the right to destroy the property and estate of another in order to recover his own,

particularly where his estate has been acquired subsequent and subject to the estate of the other.

In the words of GUFFEY v. STROUD, supra, "the well having been a failure as an *oil well,*" Respondents "have no right *to use it as a means or permit it as an occasion for taking*" Petitioner's gas.

Nor was a "reservation" of "ownership of the gas" produced from such well accomplished by the socalled "free use" clause in the original lease, under the terms of which the lessee was given the right *as against the lessor* to use *on the premises* free of cost, gas, oil and water produced on said land for *its operations thereunder.* It was the express purpose of this clause, which is a customary one in the usual form of oil and gas lease, to give the lessee the right to use gas in well and lease operations upon the leased land without the necessity of paying royalty on the gas so used in such operations. Upon the severance, by assignment, of the leasehold gas estate from the oil estate, the owner of the gas estate and the owner of the oil estate each was entitled to the benefits of such provision. Such clause does not seek to provide for the respective rights of the owner of the leasehold oil rights and the owner of the leasehold gas rights, between themselves, in the use of gas. It may be said with certainty, therefore, that Respondents, as owners of the oil rights, if they have the right to use of gas in conducting *operations under the lease and on the land in question,* do not have such right, as against Petitioner, by virtue of such clause but as an appurtenant right to the enjoyment of the estate in the oil owned by them. It is unnecessary, however to determine this question here, for even if the defendants, as owners of the oil rights, were entitled, under such free use clause, to use gas produced by them from such land for operations they might properly conduct on the leased premises under said lease, the gas is not being so used for any such permitted operation *but is being transported from the prem-*

ises and used and sold for fuel and jetting of wells in Corpus Christi Field. To such use and sale and operation the free use clause clearly has no application. ARMSTRONG, ET AL., V. SKELLEY OIL CO., 55 F. (2d) 1066.

As heretofore stated, gas in place is real property in Texas. Petitioner is owner of the gas in place, subject alone to Respondents' implied right to use such amount of gas as might be legally used as a lift of oil. Respondents, as heretofore shown, were, therefore, without right as against Petitioner to operate the well as a gas well and use and dispose of the gas therefrom for jetting of wells or fuel purposes in Corpus Christi Field, an entirely different field, for the reason that such exceeded their right of user as against the Petitioner. It accordingly constituted a trespass upon Petitioner's real property right in gas, because of which Petitioner was entitled upon equitable principles (14 R. C. L. 443-445; 32 C. J. 139, 140), as well as by Statute in Texas (Art. 4642, REV-CIV. STATS., 1925, Appendix C) to have such operation of the well and appropriation, use and sale of its gas restrained by injunction. GUFFEY V. STROUD (Tex. Com. App.), 16 S.W. (2d) 527; MILLER LINK LUMBER CO. V. STEPHENSON (Tex. Com. App.), 265 S.W. 215, affirmed (Tex. Sup. Ct.) 277 S.W. 1039; ERHARDT V. BOARO, ET AL., 113 U.S. 537; HOUSTON OIL COMPANY OF TEXAS V. VILLAGE MILLS CO., 109 Tex. 169, 202 S.W. 725. As stated in SUMMERS' "OIL AND GAS," Perm. Ed., Vol. 1, p. 70, Sec. 28:

> "Landowners or persons having separate estate in oil and gas have been allowed in numerous cases injunctive relief against trespassers actually taking or threatening to take oil and gas." (Citing numerous cases, Note 92.)

Petitioners, of course, are entitled to damages for gas and condensates of gas heretofore converted and appropriated by them from such well.

Nor is the question here one of regulation of which the Railroad Commission of Texas would have jurisdiction as concluded by the District Court. The basic substantive question presented is whether Respondents own the gas from such well or have only the right of reasonable user. This question is obviously one of title over which clearly the Railroad Commission of Texas is utterly without jurisdiction. ALTGELT v. TEXAS CO. (Tex. Civ. App.), 101 S.W. (2d) 1104 (w. of e. dis.); RAILROAD COMMISSION v. LAMB (Tex. Civ. App.), 81 S.W. (2d) 161; TIDE WATER OIL CO. v. RAILROAD COMMISSION (Tex. Civ. App.), 76 S.W. (2d) 553; RAILROAD COMMISSION v. RAU (Tex. Civ. App.), 45 S.W. (2d) 413. No question of conservation is raised.

POINT 3

Petitioner Not Precluded by Pleading From Contending Respondents Had Not Complied With Condition Giving Houston Right to Drill Gas Well

The Court of Appeals held (R. 461):

> "Southern's State court suit, and also that before us, alleged that Simmons and Webb completed the well 'in an unsuccessful effort to produce oil.' *This being true,* the second part of the working agreement, * * * required that the well be completed by them as a gas well."

Actually Petitioner alleged "that defendants, Jay Simmons and J. E. Webb, in an unsuccessful effort to produce oil from said land, drilled, and on or about July 5, 1938, completed a well thereon producing, and capable of producing, great quantities of gas" (R. 15, 16).

Respondent, J. E. Webb, a partner of his corespondent, Jay Simmons, testified:

"Q. Well, you couldn't drill that hole any further than your 6600 where you twisted off, could you?
A. I made up my mind that I didn't want to try to get any deeper after having so much trouble.
Q. Then you concluded to abandon that and bring the well in at the depth which you did bring it in?
A. There are three or four sands you can make a good producing well at.
Q. What kind of well?
A. Oil wells.
Q. At a shallower depth than the 5800 horizon?
A. Yes.
* * *
Q. Did you discover gas in this well in an unsuccessful effort to complete a commercial oil well?
A. I did not" (R. 231-234).

and:

> "We topped that sand around 5784 and went out of it below 5800, and after we had encountered the first three or four feet of the sand it was completely saturated from the gasoline, and upon removing some above the core barrel, which I had taken out to a tool shed I had on the lease for that purpose, I took samples of the core and squeezed them between my hands and gasoline ran out of the cores, and I left them in the core house and it remained in that condition several days until the atmosphere completely dried the sand out" (R. 233).

That testimony stands uncontradicted and proves that it is *not* "true" that this well was completed in compliance with the contract right of Houston Oil Company to complete not exceeding five gas wells, and proves that it is "true" that Respondents knew the 5800-foot sand at which the well was completed to be a gas sand, and "knew" the well could have been completed as an oil well at a shallower sand, but nevertheless deliberately completed it in the gas sand.

The holding by the Court of Appeals that solely because of its pleading and regardless of the uncontradicted proof in the case Petitioner is precluded from insisting upon decision by the court whether the well is such gas well as Houstion Oil Company was given the right to complete, and that Petitioner has, therefore, because of such pleading, forfeited any right in gas from the well in question, is directly contrary to the theory of pleading on which the FEDERAL RULES OF CIVIL PROCEDURE were designed and adopted. (Proceedings of the American Bar Association Institute at Cleveland, pp. 219-224.)

Such holding is in direct contravention of Rule 15(b):

> "AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. * * * "

and Rule 54(c):

> " * * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Such holding also is in conflict with other decisions of other Circuit Courts and District Courts with respect thereto. (NESTER v. WESTERN UNION TELEGRAPH CO. (Dist. Ct. So. Dist. Cal.), 25 F. Supp. 478, and authorities cited; FIELD v. WATERMAN STEAMSHIP CORPORATION (C.C.A., 5th Cir.), 104 F. (2d) 849; SWIFT & CO. v. YOUNG (C.C.A. 4th Cir.),

107 F. (2d) 170, 172; COLLINS v. METRO-GOLDWYN-MAYER PICTURES CORP'N (C.C.A. 2nd Cir.), 106 F. (2d) 83, 86; ATWATER v. NORTH AMERICAN COAL CORP'N (C.C.A. 2nd Cir.), 111 F. (2d) 125; BARTIN v. CONNECTICUT GENERAL LIFE INSURANCE CO. (Dist. Ct., Neb. Dist.), 25 F. Supp. 579).

The Court of Appeals, therefore, having erroneously deprived Petitioner of very substantial property rights upon a technical construction of pleading, and in disregard of the uncontradicted proof, in justice such decision should be reversed and the holding should be made in accordance with the uncontradicted proof that the well is not such gas well as was required to be completed by the owner of the oil rights in said land.

POINT 4

Well in Question Not Drilled by Respondents in Compliance With Conditions Giving Right to Houston to Drill Gas Well and Take Products

Assuming the well in question to be a gas well the Court of Appeals held that Petitioner having failed to exercise its option to take the well over, Respondents had the implied right under the contract provisions of the assignment from Houston Oil to Southern Alkali to take all the products therefrom. Since Petitioner was vested with title to gas in place and upon production, it is clear that the effect of the court's holding was that Petitioner, by failure to exercise its option, had forfeited to Respondents its title to so much of the gas as might be produced from the well in question. Such being the case it was necessary for Respondents strictly to comply with the conditions of the contract provision giving Houston the right to drill gas wells before they could complete the well in question as a gas well, and take the gas there-

from for failure of Petitioner to take it over. (JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 265, 268; GLOYD v. MID WEST REF. CO., 62 F. (2d) 483). Stated differently Respondents had no right to complete the well in question as a gas well and force Petitioner to take it over under penalty of forfeiture of all its products until compliance with all the conditions giving rise to such right were plainly shown.

The contract provision of the assignment from Houston to Southern Alkali gave the former the right to complete a gas well only in the event Houston, "as a result *of its operations,* discovered gas in any well drilled" by it "in an *unsuccessful effort to complete a commercial oil well*" (R. 389, 395). In other words, Respondents were permitted to complete a gas well only if the well could not be completed as an oil well. That the right was to be a limited and special right and privilege is sufficiently indicated by the following stipulation of the contract:

> "Provided, however, it is distinctly understood and agreed that the Houston Oil Company of Texas shall not have the right or privilege of completing more than five (5) such gas wells" (R. 395).

By their own confession Respondents (1) could have completed a good oil well in three or four shallower sands (R. 231-234), and (2) they did not complete the well "in an unsuccessful effort to complete a commercial oil well" (R. 231-4). Having failed to comply with the conditions giving them the right to complete the well in question as a gas well—they had no right to take its products upon Petitioner's failure to take it over. This being true it is manifest that Petitioner was entitled to injunction and damages. The decision of the Court of Appeals to the contrary is clearly wrong.

POINT 5

Rights of Houston to Gas Wells Completed By It Not Assignable

The terms of the agreement as to completing five gas wells evidence the intention of the parties that such right should be personal to Houston Oil Company and not assignable. BURCK v. TAYLOR, 152 U.S. 634.

The contract provision of the assignment by Houston Oil Company to Southern Alkali Corporation dated April 5, 1932, with respect to oil wells expressly extends to Southern Alkali Corporation, or its assigns, but the use of the word "assigns" is wholly absent from the provision as to gas wells not exceeding five in number that could be completed by Houston Oil Company.

The use of the word "assigns" has been held by the Texas courts to indicate an intention that the contract may be assigned. PHILLIPS v. OIL, INC. (Tex. Civ. App.), 104 S.W. (2d) 576; GOODLOE & MEREDITH v. HARRIS, 127 Tex. 583, 94 S.W. (2d) 1141, Tex. Civ. App. 58 S.W. (2d) 156.

Conversely, the absence of the word "assigns" evidences the intention that the contract not be assignable. HILLMAN v. SHANNAHAN, 18 Am. Rep. 281; 4 AM. JUR. 236.

Furthermore, the contract provision with regard to completing gas wells, not exceeding five in number, necessarily involved the skill, integrity, credit and responsibility of Houston Oil Company and personal trust and confidence in that company. Such a contract is not assignable. ARKANSAS SMELTING COMPANY v. BELDING MINING COMPANY, 127 U.S. 379; AMSCO PIPE LINE COMPANY v. DONICO PRODUCTION CO. (Tex. Civ. App.), 112 S.W. (2d) 483, writ dismissed; MENGER v. WARD (Tex. Sup.), 30 S.W. 853; SMITH v. PITTS (Tex. Civ. App.), 122 S.W. 46; DITTMAN v. MODEL BAKING COMPANY (Tex. Com. App.), 271 S.W. 75; MAG-

NOLIA PETROLEUM COMPANY v. HAVOLINE AUTO SUPPLY Co. (Tex. Civ. App.), 172 S.W. 759; FOSTER v. CALLAHAN & Co., 248 F. 944; DEMAREST v. DUNTON LBR. Co., 161 F. 264; 6 CORPUS JURIS SECUNDUM, p. 1076.

Factors of such personal trust and confidence reposed in the skill, integrity, credit and responsibility of Houston Oil Company include: provision for actual cost to the producing horizon exclusive of overhead and drilling costs below the producing horizon, and keeping record thereof; reliance upon Houston Oil Company to use machinery and drilling equipment adequate to safely complete and equip a gas well, gas being an inflammable, explosive and dangerous element; confidence in the integrity and reliability of Houston Oil Company not to complete a gas well unless such well could not be completed as an oil well; and willingness to pay to Houston Oil Company its actual cost of drilling and equipping a gas well because of reliance on the skill and ability of Houston Oil Company to drill and equip such well at an actual cost that would be the proper cost of such an operation.

POINT 6

Right of Houston Oil Company to Complete Gas Wells Not in Fact Assigned By It to Respondents Simmons and Webb

The right of Houston under the contract provisions of its assignment to Southern Alkali to complete five gas wells was clearly not a right appurtenant to, nor essential to the enjoyment of, the oil estate retained by it nor a covenant which without express words of grant would ordinarily pass by an assignment of such oil estate. It is a special contract provision relating alone to five gas wells and to the products thereof. It follows of course, therefore, that the granting clause of the assignment covering only "*oil rights* under said existing

leases," was a limited and special grant and would not pass the rights of Houston under such contract provisions unless some other language of the assignment required such construction (BRITTON v. COTTON STATES PET. CO. (Tex. Civ. App.), 283 S.W. 887; DORRIS v. SULLIVAN, 90 Cal. 27, 27 Pac. 216; PIPER v. UNION PACIFIC RY. CO., 14 Kan. 568).

The assignment by Houston Oil Company to Respondents Simmons and Webb, dated January 6, 1938 (R. 399), conveyed only oil rights under portions of the Harrell and Lawrence leases, which in turn, were two of six leases covering 1300 acres in which Houston had theretofore, on April 5, 1932 (R. 389), assigned to Southern Alkali and its assigns, the gas rights. The controlling terms of the assignment to Simmons and Webb (R. 399, 464) are these:

> "Whereas, First Party is the owner of the *oil rights* under an oil and gas lease from Dr. T. M. Harrell and wife to R. D. Kelley, * * * ; and, Whereas, First Party is the owner of the *oil rights* under an oil and gas lease from L. S. Lawrence and wife, R. M. Lawrence and wife, and T. M. Harrell and wife, to R. D. Kelley, * * * "; it is the intention "of this instrument for First *Party* to assign to Second Parties the *oil rights* under said existing leases in so far as they cover a portion of the above described lots, in consideration of the drilling of certain wells and the payment of the overriding royalty, as hereinafter provided; * * * Houston Oil Company of Texas, * * * does hereby bargain, sell, transfer and assign, subject to the performance of the obligations herein imposed, unto Jay Simmons and J. E. Webb, their heirs and assigns, all of its rights under said existing leases * * * in so far as same cover a thirteen-sixteenths (13/16) working interest in the *oil rights* in and to Lots 23, 24 and 27, except the East 20 acres of each of said Lots 23, 24 and 27 * * *, all of Lot 20, and all of Lot 13 less 10 acres * * *. It is understood that it is the intention

of First Party that this assignment of the *oil rights* shall assign to Second Parties all of the rights under the original oil and gas leases, except the rights of the Southern Alkali Corporation and/or the Southern Minerals Corporation, as evidenced by the contract and assignment of gas rights of April 5, 1932, by and between the Houston Oil Company of Texas and the Southern Alkali Corporation affecting, among other property, the above described property, * * *, to which instrument and all of the terms thereof reference is hereby made, as if same were fully copied herein. Second Parties, by the acceptance hereof, agree, for themselves, * * *, to commence within ten (10) days from such acceptance drilling operations * * *, Second Parties will continue drilling the premises herein assigned with not more than thirty (30) days elapsing between the completion of one well and the commencing of another well, * * * until the premises herein assigned are completely drilled, * * *, in the event said Second Parties, * * *, should fail or refuse to comply with the terms and conditions hereof, * * * revert to First Party, * * *. As further consideration for this assignment, the Houston Oil Company of Texas reserves unto itself, its successors or assigns, an overriding royalty of one-eighth (⅛) in *oil*—that is, ⅛ of 8/8 of the value or proceeds of the *oil* which shall be actually produced, * * * First Party, * * *, shall have the preferential right to purchase the *oil* produced * * *. Second Parties agree and obligate themselves, * * *, to furnish First Party with cuttings and core samples from any and all wells drilled on the premises * * *. Second Parties also agree to furnish First Party a copy of the Schlumberger record of any and all wells; and First Party shall at all reasonable times have access to the premises where the well or wells are being drilled, and First Party shall be permitted to have a representative present to inspect any test made of any ***such well*** * * *."

Clearly, Houston Oil Company did not assign to Respondents Simmons and Webb any of its rights as to completion of gas wells, limited to five in number. As expressed by the minority opinion of the Court of Appeals.

> "Not only in the granting clause of this assignment but throughout, the thing assigned is declared to be, *the oil rights under the Harrell lease*. Nowhere in the assignment is there a reference to gas rights of any kind. It is quite plain therefore, that the parties had in mind, transferring not gas but oil rights, * * * " (R. 465).

Additionally indicative of the absence of any intention by Houston Oil Company to assign to Simmons and Webb its rights to complete gas wells are the following points:

(1) Houston's contract right to complete five gas wells applied to six leases (R. 389) covering 1300 acres of land (R. 207), but it only assigned to Respondents Simmons and Webb (R. 400) "the oil rights" in portions of two of said leases.

(2) The expression of intention "that this assignment of the oil rights shall assign to second parties all of the rights under the original oil and gas leases, except the rights of the Southern Alkali Corporation and/or the Southern Minerals Corporation, as evidenced by the contract and assignment of gas rights of April 5, 1932" (R. 465), cannot be taken as an enlargement of the granting clause which is limited to "oil rights," and negatives any intention to assign any portion of Houston's right to complete five gas wells; Houston's right to complete five gas wells was not a right under "the original oil and gas leases" but was a right provided to Houston under the contract provision of the mentioned assign-

ment to Southern Alkali Corporation. Such contract right was not assigned.

(3) Houston's reservation of an overriding royalty of 1/8 of 8/8 "of the value or proceeds of the *oil* which shall be actually produced" negatives any intention to assign its right to complete gas wells; otherwise, its overriding royalty would have been made to apply to gas as well as to oil.

(4) Houston reserved the right to purchase production of *oil* but not gas.

(5) Simmons and Webb were obligated to furnish Houston with cores and cuttings and Schlumberger records, and to permit Houston's representative to inspect any test of ***any such well;*** thereby clearly indicating intention that the rights of Simmons and Webb were confined to *oil wells.*

(6) Such construction deprives Houston of a valuable property right without any compensation, and without its day in court.

(7) No reference is made to the rights of Houston Oil Company under the contract and assignment of gas rights dated April 5, 1932, and the only purpose of the reference to the rights of Southern Alkali Corporation was to call to the attention of Simmons and Webb that the assignment of the oil rights was subject to the right of Southern Alkali to complete oil wells as provided in said previous assignment.

(8) The contract right to drill five gas wells applied to 1300 acres. It cannot be supposed that Houston Oil Company intended to convey to Simmons and Webb the right to drill all five wells on the portions of the two leases assigned, and no words were used indicative of any intention to assign the right to drill a proportionate number of gas wells or what such proportion should be.

POINT 7

The Court of Appeals Erroneously Construed the Contract Provision as to Gas Wells as Affording a Simple Option Rather Than as Providing a Forfeiture.

The Court of Appeals, in its opinion (R. 459), holds:

> "It is well settled that in the exercise of options the time limited is generally of the essence of the contract. Campbell v. Fetty, 271 Fed. 621, 17 C.J.S., p. 1072. Especially is this true when a thing so uncertain and fluctuating as a new gas well is the subject of the option. 17 C.J.S., p. 1071. The option to take over this well, which was limited to forty days from its completion, could not be exercised four months after its completion. It is unnecessary to enquire whether the further finding of the district court was correct, that the option right was waived by Southern and the waiver was converted into an estoppel because Simmons and Webb made contracts and substantial expenditures on the faith of Southern's statement that it did not wish the well."

In so holding the Court of Appeals construed the contract provision of the assignment as being a simple option rather than a forfeiture provision. CAMPBELL v. FETTY, 271 F. 921, the only case cited by the Court in its opinion in this connection, was a suit to recover on a simple guaranty letter in words as follows:

> "In consideration of this subscription, as I stated to you, should you carry this stock for 24 months, and then desire to dispose of it, I will take it off your hands and allow you 8 per cent. carrying charge. You understand that, should any dividends be paid in the meantime, they would, of course, be deducted from the carrying charge."

The Court in that case held that time was the essence of the

agreement, and since demand was not made at expiration of the 24-month period the option to require defendant to pay for the stock was lost.

The construction by the Court of Appeals of the contract provision of the assignment as being a simple option and not a forfeiture provision is wrong because title to all gas in place in and under the land when the well was drilled having been for a large consideration, vested in Petitioner, loss of the right to "take over" the well necessarily results in forfeiture of Petitioners' title to gas. Such construction and holding is contrary to the weight of authority and in direct conflict with the established law in Texas as announced by the Supreme Court of Texas in JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 268, and is at variance with and contrary to the decision of the Circuit Court of Appeals for the Tenth Circuit in GLOYD v. MIDWEST REFINING COMPANY, 62 F. (2d) 483.

IN JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 268, Jones conveyed to Gibbs all the merchantable pine timber on 1981.2 acres of land with the right for a period of 10 years to remove the same and with the additional right to extend such time an additional 5 years by the payment of 15 cents per acre per year, which

> "shall be paid for as much as one year in advance."

The Court, in holding that such contract right was not a simple option but a conveyance on valuable consideration and therefore to be construed as a forfeiture provision against the heirs of Jones seeking to declare the contract right to renew the contract terminated by the failure of Gibb's successors to strictly comply with the provision for payment of 15 cents per acre, said:

> "Since the privilege to extend the time for removal of the timber is given in the deed itself and is supported by

the consideration paid at the execution of the deed, the agreed value of the timber, and inasmuch as the deed is treated, upon the exercising of the privilege, as a present grant for the full term, including the period of the extension, a judgment decreeing that such deed became no longer operative at the end of the primary term upon the grantee's failure to comply strictly with the terms of the provision for extension, while technically but an adjudication that the grant terminated by its own terms, would, practically considered, and certainly from the viewpoint of the grantees, amount to a forfeiture of a valuable property right for which they had fully paid. In view of these differences between the option for extension granted by the deed to defendants in error and the ordinary option to buy land, it is our opinion that, in determining whether defendants in error did those things necessary under the deed to extend the right to cut the timber, *a too exactly strict compliance with the terms of the option should not be required and that the equities in favor of defendants in error, on account of their having paid the purchase price for all of the timber and having removed less than one-third of it, should not be disregarded.*"

The case of GLOYD v. MIDWEST REFINING COMPANY, 62 Fed. (2d) 483, in construing the nature of the rental payment clause of an oil and gas lease, held that in determining whether the lease had terminated such clause was to be construed as a forfeiture provision and not as a simple option provision, holding:

> "If the lease creates an option to explore, which the lessee may continue and extend by the payment of rental, that option right is forfeited. *This, therefore, is esentially a suit to establish a forfeiture as a matter of record and to obtain the cancellation of the thing forfeited. Equity will only give its aid to enforcement of a forfeiture where to do so is more cognizant with the principles of right, justice, and morality than to withhold it.*"

Had the Court considered the rights of the parties under the rules governing forfeitures rather than the rules governing failure to exercise a simple option, we confidently assert the Court would have held that Petitioner, under the facts and circumstances of this case, did not waive its right and is not estopped to take over the well at "cost to the producing horizon;" and that Petitioner is now entitled to take over the well as of the date of completion and to an accounting for production therefrom.

In seeking to establish a forfeiture the burden of proof is always on the party asserting the forfeiture and claiming the benefits thereof. 19 AM. JUR., pp. 96-99.

> "Where a litigant, by the terms of his contract, is made liable at law for a penalty or is subject to loss in the nature of a forfeiture, owing to the nonperformance by him of a condition or covenant therein contained, the situation is viewed by equity with extreme disfavor, and the contractual provision will be construed strictly against the interest of the party who claims the benefit thereof. * * * A party who seeks to enforce a forfeiture must show that he has done everything on his part to be entitled to claim enforcement. The burden of proof is cast upon him; and if he fails to establish the necessary facts, his right to insist upon the forfeiture will be deemed to have been waived."

Petitioner's right to take over the well, if it be a gas well, should be reëxamined in the light of the equitable rules governing forfeitures.

WHEREFORE, Petitioner respectfully submits that this case is one over which this Honorable Court has jurisdiction and one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter re-

viewing and reversing said decision, granting to Petitioner the relief to which it is entitled.

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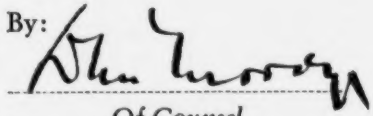
By: 
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